IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE EX REL. MARK MILLER,	:	
	:	**Case No. C180608**
RELATOR-APPELLEE,	:	
	:	**Trial No. A1801834**
v.	:	
	:	
COUNCILMEMBER SITTENFELD, ET AL.,	:	
	:	
	:	
RESPONDENTS-APPELLANTS.	:	
	:	

MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER

The Respondents-appellants move this Court to (1) quash the subpoenas issued to GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, Sprint PCS, and AT&T Wireless, and (2) enter an order prohibiting further discovery that seeks to thwart the jurisdiction and appellate review of this Court. This Motion is made pursuant to Rules 45(C)(3)(b) and 26(C) of the Ohio Rules of Civil Procedure.

Respectfully submitted,

PAULA BOGGS MUETHING,
City Solicitor

/s/ Peter J. Stackpole
Peter J. Stackpole (0072103)
Emily E. Woerner (0089349)
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
Phone: (513) 352-3350
Fax: (513) 352-1515
E-mail: peter.stackpole@cincinnati-oh.gov
Attorneys for Respondents-Appellants

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MEMORANDUM IN SUPPORT

The Finney law firm, on behalf of the relator-appellee, Mark Miller, issued five subpoenas to cell service carriers on December 3, 2018. The subpoenas are attached to this motion as exhibits A, B, C, D, and E. The subpoenas are overbroad and seek information that is privileged, personal, and not related to City business. Under Rules 26(C) and 45(C)(3)(b), this Court should quash the subpoenas. Furthermore, the City respectfully requests that this Court issue a protective order to prevent Miller from engaging in further discovery on matters within the scope of this appeal while this matter is under review by this Court.

First, the subpoenas in question require production of: "All text messages sent from or received by" a councilmember's cell phone "from January 1, 2018 to present, including, without limitation, the content of each such text message, and the date, time, sender, and recipient information for each such text message." These overbroad requests mirror the scope of the order issued by the trial court in case A1801834, which the City has appealed. Moreover, the subpoenas have been issued in the trial court case, but the trial court is divested of jurisdiction of matters within the scope of this appeal. *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 757, 2007-Ohio-309, ¶21 ("[T]he trial court is prohibited from taking any action that is inconsistent with the appellate court's ability to review, modify, or reverse the judgment being appealed.") Miller should not be permitted to thwart appellate review of the scope of the trial court's order. For this reason alone, the subpoenas should be quashed.

Second, the subpoenas issued to cell service providers are overbroad and compliance with them will result in the production of privileged and confidential material as well as personal messages to friends and family members that are not related to City

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business. The issuance of these subpoenas is designed to burden and oppress both the councilmembers and the people with whom they communicate, including their attorneys. Finally, the subpoenas are overbroad because they fail to comply with the Stored Communications Act, 18 U.S.C. §§ 2701-2712, which generally prohibits providers of communication services from divulging the contents of a communications to third-parties, even though requested by a civil subpoena. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 350 (E.D. Mich. 2008) ("[A]s noted by the courts and commentators alike, §2702 lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to a subpoena or court order.")

CONCLUSION

Based on the foregoing, the City respectfully requests that the Court quash the subpoenas issued to GTE wireless of the Midwest incorporated d/b/a Verizon wireless, Sprint PCS, and AT&T wireless. Furthermore, the City moves this Court to issue a protective order prohibiting further discovery privileged and private materials that are already the subject of appellate review by this Court.

Respectfully submitted,

PAULA BOGGS MUETHING,
City Solicitor

/s/ Peter J. Stackpole
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Emily E. Woerner (0089349)
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Fax: (513) 352-1515
E-mail: peter.stackpole@cincinnati-oh.gov
Attorneys for Respondents-Appellants

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CERTIFICATE PURSUANT TO CIVIL RULE 26(C)

I hereby certify that prior to filing this motion to quash subpoenas for a protective order that I, along with my colleagues in the City Solicitor's Office, made efforts to resolve the issues related to the disclosure of privileged communications, as well as personal communications between spouses and family members. Documentation of these efforts are attached to this motion as exhibit F. Despite these efforts, the parties were unable to resolve this issue.

/s/ Peter J. Stackpole
Peter J. Stackpole (0072103)
Attorney for Respondents-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and sent by email this 26th day of December 2018 to the following:

Brian C. Shrive
Christopher P. Finney
FINNEY LAW FIRM, LLC
4270 Ivy Pointe Blvd., Suite 225
Cincinnati, Ohio 45245
(513) 943-6661
(513) 943-6669 (fax)
Chris@FinneyLawFirm.com
Brian@FinneyLawFirm.com

/s/ Peter J. Stackpole
Peter J. Stackpole (0072103)

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

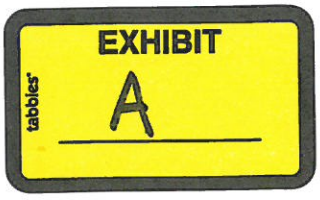
STATE OF OHIO *ex rel.* Mark W. Miller	:	**CASE No. A1801834**
	:	**JUDGE**
Relator,	:	
v.s		**SUBPOENA DUCES TECUM**
	:	
ALEXANDER PAUL GEORGE SITTENFELD, et al.	:	

Respondents.

To: GTE WIRELESS OF THE MIDWEST INCORPORATED
d/ba VERIZON WIRELESS
c/o CT Corporation System
Statutory Agent
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219
Tracking No. 9314 8699 0430 0053 5148 31

Pursuant to Rule 45(A)(1)(b)(iii) of the Ohio Rules of Civil Procedure, please produce and permit inspection and copying of any and all of the following designated documents or electronically stored information to the offices of Finney Law firm, LLC, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245 on or before December 17, 2018 at 5:00 p.m.:

1. All text messages sent from or received by telephone number (513) 365-2404 from January 1, 2018 to present, including, without limitation, the content of each such text message, and the date, time, sender, and recipient information for each such text message;
2. All other records relating to text messages sent from or received by telephone number (513) 365-2404 from January 1, 2018 to present;
3. All records relating to efforts to delete text messages sent from or received by telephone number (513) 365-2404 from January 1, 2018 to present;



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4. All records relating to efforts to retrieve text messages sent from or received by telephone number (513) 365-2404 from January 1, 2018 to present;
5. All records relating to messages sent or received using SMS Gateway Address 5133652404@vtext.com from January 1, 2018 to present including, without limitation, the content of each such message, and the date, time, sender, and recipient information for each such message;
6. All records relating to messages sent or received using MMS Gateway Address 5133652404@vzwpix.com from January 1, 2018 to present including, without limitation, the content of each such message, and the date, time, sender, and recipient information for each such message;
7. All records relating to email messages sent from or received by email accounts connected to telephone number (513) 365-2404 from January 1, 2018 to present;
8. All voicemail messages received by telephone number (513) 365-2404 from January 1, 2018 to present;
9. All records relating to reports of damage to the cell phone associated with telephone number (513) 365-2404, including without limitation, water damage, orders for a replacement phone, or orders to transfer data to a new phone, from January 1, 2018 to present;
10. All billing records associated with telephone number (513) 365-2404 from January 1, 2018 to present, indicating all telephone numbers for which billing is shared with telephone number (513) 365-2404.
11. A copy of your text message retention policy.

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WITNESS my hand on behalf of the Common Pleas Court of Hamilton County, Ohio, this 3rd day of December 2018.

Respectfully submitted,

/s/ Brian C. Shrive

Christopher P. Finney (0038998)
Brian C. Shrive (0088980)
FINNEY LAW FIRM, LLC
4270 Ivy Pointe Blvd., Suite 225
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Chris@FinneyLawFirm.com
Brian@FinneyLawFirm.com

Trial Attorneys for Relator Mark W. Miller

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Rule 45 Excerpt

(C) Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2)(a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing, or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a

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substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

(D) Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents or electronically stored information pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) If a request does not specify the form or forms for producing electronically stored information, a person responding to a subpoena may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably useable. Unless ordered by the court or agreed to by the person subpoenaed, a person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) A person need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the person from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the factors in Civ. R. 26(B)(4) when determining if good cause exists. In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(4) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(5) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial-preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

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CERTIFICATE OF SERVICE

Undersigned counsel does hereby certify that a true and accurate copy of the foregoing was served via electronic mail upon the following counsel this 3rd day of December 2018:

Peter Stackpole, Esq.
Deputy City Solicitor
Emily E. Woerner, Esq.
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
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emily.woerner@cincinnati-oh.gov

Counsel for Respondents

Bryan E. Pacheco, Esq.
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dbell@taftlaw.com

Counsel for Respondent City of Cincinnati

/s/ Brian C. Shrive
Brian C. Shrive (0088980)

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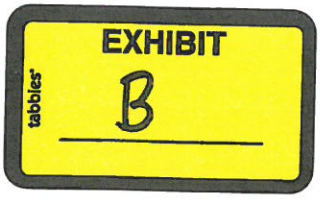
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO *ex rel.* Mark W. Miller	:	**CASE No. A1801834**
	:	**JUDGE ROBERT P. RUEHLMAN**
Relator,	:	**SUBPOENA DUCES TECUM**
v.	:	
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	:	

To: GTE WIRELESS OF THE MIDWEST INCORPORATED
d/ba VERIZON WIRELESS
c/o CT Corporation System
Statutory Agent
4400 Easton Commons Way, Suite 125
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Tracking No. 9314 8699 0430 5153 64

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1. All text messages sent from or received by telephone number (513) 646-0186 from January 1, 2018 to present, including, without limitation, the content of each such text message, and the date, time, sender, and recipient information for each such text message;
2. All other records relating to text messages sent from or received by telephone number (513) 646-0186 from January 1, 2018 to present;



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3. All records relating to efforts to delete text messages sent from or received by telephone number (513) 646-0186 from January 1, 2018 to present;
4. All records relating to efforts to retrieve text messages sent from or received by telephone number (513) 646-0186 from January 1, 2018 to present;
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7. All records relating to email messages sent from or received by email accounts connected to telephone number (513) 646-0186 from January 1, 2018 to present;
8. All voicemail messages received by telephone number (513) 646-0186 from January 1, 2018 to present;
9. All records relating to reports of damage to the cell phone associated with telephone number (513) 646-0186, including without limitation, water damage, orders for a replacement phone, or orders to transfer data to a new phone, from January 1, 2018 to present;
10. All billing records associated with telephone number (513) 646-0186 from January 1, 2018 to present, indicating all telephone numbers for which billing is shared with telephone number (513) 646-0186.

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11. A copy of your text message retention policy.

WITNESS my hand on behalf of the Common Pleas Court of Hamilton County, Ohio, this 3rd day of December 2018.

Respectfully submitted,

/s/ Brian C. Shrive

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Brian C. Shrive (0088980)
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(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

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Deputy City Solicitor
Emily E. Woerner, Esq.
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
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Counsel for Respondents

Bryan E. Pacheco, Esq.
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Counsel for Councilmember Respondents

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Donnell J. Bell, Esq.
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dbell@taftlaw.com

Counsel for Respondent City of Cincinnati

/s/ Brian C. Shrive
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COURT OF COMMON PLEAS
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STATE OF OHIO *ex rel.* Mark W. Miller	:	**CASE No. A1801834**
	:	**JUDGE ROBERT P. RUEHLMAN**
Relator,	:	**SUBPOENA DUCES TECUM**
v.	:	
ALEXANDER PAUL GEORGE SITTENFELD, et al.	:	
Respondents.	:	
	:	

To: Sprint PCS
CUSTODIAN OF RECORDS
SPRINT CORPORATE SECURITY
KSOPHM0216-Subpoena Compliance
6480 Sprint Parkway
Overland Park, KS 66251
Attn: Melanie Zimer
Tracking No. 9314 8699 0430 0053 5145 96

Pursuant to Rule 45(A)(1)(b)(iii) of the Ohio Rules of Civil Procedure, please produce and permit inspection and copying of any and all of the following designated documents or electronically stored information to the offices of Finney Law firm, LLC, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245 on or before December 17, 2018 at 5:00 p.m.:

1. All text messages sent from or received by telephone number (513) 485-6759 from January 1, 2018 to present, including, without limitation, the content of each such text message, and the date, time, sender, and recipient information for each such text message;
2. All other records relating to text messages sent from or received by telephone number (513) 485-6759 from January 1, 2018 to present;



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3. All records relating to efforts to delete text messages sent from or received by telephone number (513) 485-6759 from January 1, 2018 to present;
4. All records relating to efforts to retrieve text messages sent from or received by telephone number (513) 485-6759 from January 1, 2018 to present;
5. All records relating to messages sent or received using SMS Gateway Address 5134856759@messaging.sprintpcs.com from January 1, 2018 to present including, without limitation, the content of each such message, and the date, time, sender, and recipient information for each such message;
6. All records relating to messages sent or received using MMS Gateway Address 5134856759@pm.sprint.com from January 1, 2018 to present including, without limitation, the content of each such message, and the date, time, sender, and recipient information for each such message;
7. All records relating to email messages sent from or received by email accounts connected to telephone number (513) 485-6759 from January 1, 2018 to present;
8. All voicemail messages received by telephone number (513) 485-6759 from January 1, 2018 to present;
9. All records relating to reports of damage to the cell phone associated with telephone number (513) 485-6759, including without limitation, water damage, orders for a replacement phone, or orders to transfer data to a new phone, from January 1, 2018 to present;
10. All billing records associated with telephone number (513) 485-6759 from January 1, 2018 to present, indicating all telephone numbers for which billing is shared with telephone number (513) 485-6759.

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11. A copy of your text message retention policy.

WITNESS my hand on behalf of the Common Pleas Court of Hamilton County, Ohio, this 3rd day of December 2018.

Respectfully submitted,

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FINNEY LAW FIRM, LLC
4270 Ivy Pointe Blvd., Suite 225
Cincinnati, Ohio 45245
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Trial Attorneys for Relator Mark W. Miller

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Rule 45 Excerpt

(C) Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2)(a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing, or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a

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CERTIFICATE OF SERVICE

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Deputy City Solicitor
Emily E. Woerner, Esq.
Assistant City Solicitor
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Counsel for Respondents

Bryan E. Pacheco, Esq.
Mark A. Vander Laan, Esq.
DINSMORE & SHOHL, LLP
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Cincinnati, Ohio 45202
mark.vanderlaan@dinsmore.com
bryan.pacheco@disnmore.com

Counsel for Councilmember Respondents

Aaron M. Herzig, Esq.
Donnell J. Bell, Esq.
TAFT STETTINIUS & HOLLISTER LLP
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Cincinnati, Ohio 45202
aherzig@taftlaw.com
dbell@taftlaw.com

Counsel for Respondent City of Cincinnati

/s/ Brian C. Shrive
Brian C. Shrive (0088980)

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

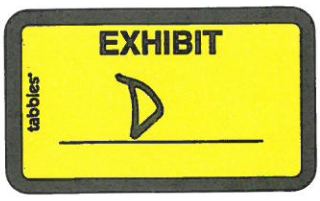
STATE OF OHIO *ex rel.* Mark W. Miller	:	**CASE No. A1801834**
	:	**JUDGE ROBERT P. RUEHLMAN**
Relator,	:	**SUBPOENA DUCES TECUM**
v.	:	
ALEXANDER PAUL GEORGE SITTENFELD, et al.	:	
Respondents.	:	
	:	

To: AT&T Wireless
208 South Akard, 10th Floor
Dallas, TX 75202
(877) 971-6093 (fax)
attmobility.ncc@att.com

Tracking No. 9314 8699 0430 0053 5150 29

Pursuant to Rule 45(A)(1)(b)(iii) of the Ohio Rules of Civil Procedure, please produce and permit inspection and copying of any and all of the following designated documents or electronically stored information to the offices of Finney Law firm, LLC, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245 on or before December 17, 2018 at 5:00 p.m.:

1. All text messages sent from or received by telephone number (513) 417-0743 from January 1, 2018 to present, including, without limitation, the content of each such text message, and the date, time, sender, and recipient information for each such text message;
2. All other records relating to text messages sent from or received by telephone number (513) 417-0743 from January 1, 2018 to present;



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3. All records relating to efforts to delete text messages sent from or received by telephone number (513) 417-0743 from January 1, 2018 to present;
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5. All records relating to messages sent or received using SMS Gateway Address 5134170743@txt.att.net from January 1, 2018 to present including, without limitation, the content of each such message, and the date, time, sender, and recipient information for each such message;
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9. All records relating to reports of damage to the cell phone associated with telephone number (513) 417-0743, including without limitation, water damage, orders for a replacement phone, or orders to transfer data to a new phone, from January 1, 2018 to present;
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11. A copy of your text message retention policy.

WITNESS my hand on behalf of the Common Pleas Court of Hamilton County, Ohio, this 3rd day of December 2018.

Respectfully submitted,

/s/ Brian C. Shrive

Christopher P. Finney (0038998)
Brian C. Shrive (0088980)
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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO *ex rel.* Mark W. Miller	:	**CASE No. A1801834**
	:	**JUDGE ROBERT P. RUEHLMAN**
Relator,	:	**SUBPOENA DUCES TECUM**
v.	:	
ALEXANDER PAUL GEORGE SITTENFELD, et al.	:	
Respondents.	:	
	:	

To: AT&T Wireless
208 South Akard, 10th Floor
Dallas, TX 75202
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attmobility.ncc@att.com

Tracking No. 9314 8699 0430 0053 5149 23

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Stackpole, Peter

From: Woerner, Emily
Sent: Sunday, December 23, 2018 4:31 PM
To: Christopher P. Finney; Brian C. Shrive
Cc: Boggs Muething, Paula; Stackpole, Peter
Subject: Subpoenas



Chris and Brian,

We received notice of the subpoenas you issued to the Councilmember Respondents in the open meetings case. We are surprised and concerned that you would issue such a broad subpoena to each of the Councilmembers' service providers, especially because the content you request is at the center of the appeal we filed in this matter. It seems contrary to our discussions about having your expert talk to our expert about what we have and what steps we've taken to preserve material, and is not a productive step in the discussions we've had regarding resolving this matter.

Please consider this our formal request to withdraw/modify the subpoenas. First, in regards to Councilmembers Sittenfeld, Landsman, and Seelbach, they each have preserved the texts that are the subject of your discovery requests and submitted the relevant texts for an in camera inspection in the public records case. In fact, as an additional precaution, each of them had their cell phones imaged within the last few weeks which preserves a complete digital copy of their entire cell phones. There is simply no additional relevant information for the cell phone provider to provide, and the information you request in your subpoena is likely to include privileged materials.

As for Councilmember Dennard, we informed you that the cell phone she was using in the beginning of 2018 was damaged, but that her new phone was imaged. That new phone did not contain texts from the timeframe of the public records request litigation. We informed you that we were using Binary Intelligence to take any and all steps to recover information from Councilmember Dennard's old phone, and that they were also working with Councilmember Dennard to access any cloud backups of her phone. Councilmember Dennard was completely cooperative in this process, and her old phone was restored by Binary Intelligence. The Law Department is now in possession of the image of the old phone, and it does contain the text messages from all relevant timeframes to both lawsuits. We are currently reviewing and exporting those messages into a format reviewable by the First District. So, again, there is simply no additional relevant information to obtain from Councilmember Dennard's cell provider either, and the material you seek is likely to contain privileged materials.

As for Councilmember Young, he has been cooperative in all steps to recover text messages. At this time, it does not appear that there is a cloud backup of his texts, and his phone has been imaged. At the moment, the Law Department is not in possession of any additional text messages from the relevant time frames. We further note that the information you seek is likely to contain privileged materials.

Finally, we do not see any reason for the subpoenas to ask for all text messages sent or received from these phone numbers. This is a particularly invasive request that delves into personal communications between spouses and family members. Even in the context of the apparent pending criminal investigation, the County Prosecutor recognized the sensitivity of such information and requested that the Court appoint a special master to handle the materials. You also go far beyond the subject matter of this litigation to request all voicemails and emails—again, without any limitation. You seek information about joint accountholders as

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well—people with whom communications cannot possibly create open meetings liability. We cannot see how this request has any legitimate purpose in relation to this litigation.

Please take immediate steps to withdraw and/or modify the subpoenas. We look forward to your response.

Emily Smart Woerner
Senior Assistant City Solicitor
City Solicitor's Office
513/352-3307 (o) | 513/352-1515 (f)
emily.woerner@cincinnati-oh.gov

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